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Nos. 23-34

In the Supreme Court of the United States

OCTOBER TERM, 1947

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE CEMENT INSTITUTE, ET AL.; AETNA PORTLAND CEMENT COMPANY, ET AL.; MARQUETTE CEMENT MANUFACTURING COMPANY; CALAVERAS CEMENT COMPANY, ET AL.; HURON PORTLAND CEMENT COMPANY; SUPERIOR PORTLAND CEMENT, INC.; NORTHWESTERN PORTLAND CEMENT COMPANY; RIVERSIDE CEMENT COMPANY, A CORPORATION; UNIVERSAL ATLAS CEMENT COMPANY; CALIFORNIA PORTLAND CEMENT COMPANY; MONOLITH PORTLAND CEMENT COMPANY, ET AL.; BLAINE S. SMITH, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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It would be impossible, as a practical matter, to deal in this brief with all of the arguments advanced in the briefs filed by the respondents. We

have therefore limited reply to arguments which are not within the compass of our original brief.

I. THE INSTITUTE'S ATTEMPT TO HAVE THIS COURT MAKE ITS OWN INDEPENDENT DETERMINATION OF THE FACTS ESTABLISHED BY THE EVIDENCE

To a very large extent the Institute[1] has presented its case upon the basis that this Court should accept, in lieu of the Commission's findings, the Institute's version of the facts.[2] The Institute is, in effect, asking this Court to do what it outspokenly condemned in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73, as follows:

> "The findings of the Commission as to facts, if supported by testimony, shall be conclusive." 15 U. S. C. § 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own

[1] The brief filed by the Institute is also filed on behalf of its officers and trustees and 59 of the 74 respondent producers.

[2] In general, the respondents other than the Institute group likewise make various factual allegations based upon their culling of particular items of evidence from the vast record, and propose that the Court accept their factual statements in substitution or in supplement of the Commission's findings. It is impossible in this brief to meet the burden of showing the extent to which we believe such factual statements to be either erroneous or incomplete.

appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63) forbid that exercise of power.

The Institute, relying upon the outline of the evidence contained in its 3,112-page Appendix to its brief, (1) makes various statements as to facts alleged to be established by the evidence and (2) demands rejection of numerous findings of the Commission upon the ground that they represent factual inferences which are unreasonable and arbitrary because based upon documents or testimony taken out of context, or not representative of the great body of related evidence, or offset by "undisputed" facts not referred to in the findings, or subject to other alleged infirmities.

Limitations of time and space make it impossible to deal comprehensively with the Institute's reconstruction of the facts and its allied attack upon the Commission's findings. All that we can undertake is to illustrate the pitfalls involved in acceptance by this Court of the Institute's version of the facts established by the evidence, by way of supplement to or refutation of the facts found by the Commission. In order to show how treacherous it would be to follow the course proposed by the Institute, we briefly discuss below certain "facts" stated by the Institute with reference to (a) sealed bids to govern-

mental agencies, (b) respondents' suppression or limitation of trucking by purchasers of their product, (c) a finding relating to the Institute's freight rate books, and (d) alleged diversity in the "methods" used by respondents for determining delivered prices.

(1) *Certain "facts" stated by the Institute as to sealed bids to Governmental agencies*

The Institute states (Br. 134, 136) that in the case of sealed bids to governmental agencies not involving Federal land grant rates the respondents have in "many" instances quoted a lower destination price than the identical delivered price produced by application of their pricing formula.[3] When we turn to the citation given to support this statement (Inst. App. II, 879–880), we find merely that on "some" bids the Government obtained prices lower than "commercial" prices, with citation of nine such instances. Examination of what the record shows as to these nine instances discloses that they were the product of most unusual, exceptional circumstances or constituted an isolated departure from accepted

[3] The comparison made by the Institute is stated in terms of "prevailing dealer price" or "prevailing commercial prices" at destination. But since the Institute has not questioned the Commission's finding (7 (a), R. 15988) that substantially all sales of cement by respondent producers are made at a delivered price and that this price in fact represents the lowest combination of any base price and freight rate from base to destination, the terms used by the Institute have reference to delivered price so computed.

practice made once by a company during a period of many years.

The two bids first cited were to T. V. A. The Institute's Appendix elsewhere shows (II, 970–995) that these low bids resulted from T. V. A.'s announced threat to build its own cement plant unless it received bids quoting prices satisfactory to it and ensuing negotiations between T. V. A. and representatives of cement producers to obtain quotation of such bids (see particularly Inst. App. II, 989–991).

The next instance is Tygart River Dam. The vice president of the company submitting the low bid testified that after two higher bids had been rejected by the Government, he "felt that inasmuch as the T. V. A. had used this yardstick [$1.30 base price] * * * there was no reason why we should not apply the same yardstick in arriving at the price for Tygart Valley" (R. 7255–6). The quantity involved was 600,000 barrels (*ibid.*) and the company has never since initiated a lower price for Government business (R. 7353).

The next instance is the Fort Peck Dam project. After the Government had turned down bids submitted at identical prices and was about to run out of cement at the project, it entered into an "emergency," negotiated contract (R. 3941–2). The quantity involved was 660,000 barrels and the producer in question was at the time "in distress

for sales" (R. 3942). The president of respondent Universal Atlas "didn't like" what was done and "wanted to know why * * * it was the act of the cement gentlemen to go and bid under it—without any warning" (*ibid.*).

The next instance is Muskingum Dam. This was about the time of the Tygart Dam bidding and the Government rejected the first bids received (R. 11477). Respondent Pittsburgh then bid a lower price because it believed that Mr. Ickes and others in Washington expected a maximum price approximating the T. V. A. and Tygart prices and was fearful that they would say, "We will buy from the most distant point," or "Buy a cement plant and furnish our own cement" (R. 11499).

The next two instances are Newkirk and Conchas Dam. A company in the southwest made a special price partly because the quantity was so large as to assist in continuous operation of its mill; it has never since had contracts in such quantity (R. 11991).

The next instance is Greenville, Mississippi. The making of a bid below the company's published price led to the filing of a complaint with the Trade Practice Committee of the Institute and a letter of inquiry concerning the bid from that Committee (R. 12995–6).

The last instance, Ohio River Locks and Dam, was a bid made in 1925 and the witness could not

recall any instance since that time in which his company had made a special price to a governmental agency (R. 12174).

The Appendix, after its listing of the above nine cases in which respondents' pricing formula was not followed, states: "Other references to lower prices * * * are found in the testimony of several executives." Citation is given to testimony of six executives. Three of them (Browder, Coogan, Letzkus) relate only to the nine cases already discussed. A fourth citation (Elcock) has no relation to the point. Of the other two, one (Koch) is simply a general statement that the witness recalled that bids below commercial prices have been made to governmental agencies (R. 9606) and one (Rooney) gave one instance of such a bid by his company (R. 9939–60).

The Institute's Appendix squarely states that respondents used exactly the same basis for computing delivered price in sealed bids to governmental agencies as they used in other sales or price quotations. It is there said (App. II, 876): "Executives of 27 respondents testified that when they filed sealed bids with the federal government they used their regular commercial prices at the destinations for which the bids were requested", and that such prices, like commercial prices, represented the lowest combination of any base price plus freight to destination. It is

further there stated that executives of 18 respondents testified that they priced in the same way when submitting sealed bids to state agencies (*id.*, 705).

Turning again to the Institute brief (134–135), we find the broad statement that "almost invariably when a sealed bid lower than the prevailing price has been opened, this, like any other open price reduction forces a similar reduction to all other buyers." Five references to the Appendix are cited in support of this statement. They, in fact, support the statement only to this extent—one witness testified that the bid which his company made in 1931 to a state highway department brought a general price decline in its territory (App. IV, 2938) and one officer of a respondent producer wrote in a letter: "It *looks a little* as if this price drop [initiated by Huron] *may be* a result of the low bid put in by competitors on the recent Wayne County letting" (App. I, 287–8).[4]

Not only has the Institute's statement no substantial support in the portions of the record to which it refers, but precisely the contrary conclusion is to be drawn from the record. The president of Lone Star,[5] after testifying that his

[4] Italics supplied.

[5] Lone Star is one of the five largest producers of cement (Fng. 4 (a), R. 15981) and it operates ten mills located in seven scattered states (Fng. 1 (2h), R. 15969).

company sometimes made special prices to contractors, stated that when dealers find out about such prices they naturally ask for them, "but they are not given to them by our company, and from my experience, it is not a general practice to give it to them" except in a few big centers (R. 10227–8). He added that if the dealer "is on the same basis as his competitor as to price, he is not hard to handle" (R. 10228). If a special price, i. e., one that is non-uniform and competitive, does not bring a general price reduction when made to a contractor, *a fortiori* it does not have this effect when made to a governmental agency. The substantial price reduction which was made in the case of Tygart Dam did not affect the commercial price at the very place of delivery to the Government (R. 7257).

(2) *The Institute's attack upon the Commission's findings as to trucking*

The crux of the Commission's findings with reference to trucking is:

> Finally, around 1929 and 1930, the respondents, through cooperation, understandings, and agreements among themselves and with other interested groups, began taking active steps to eliminate, discourage, and control the trucking of cement. The primary reason for this activity by respondents was the destructive

> effect of trucking upon the delivered-price system. (Fng. 11 (b), R. 16046.)[6]

The Institute, in attacking the second sentence quoted above (Br. 160–169), says (Br. 166):

> Every respondent which took steps to control truck delivery stresses as the reason the devastating effect on its dealer relations. By omitting any reference to this important fact while seizing upon words and phrases out of context, the Commission has distorted the evidence, and attempted to conjure up a connection between the elimination of trucking by some of the respondents and the use of a multiple basing point method of pricing.

The Commission quite properly placed reliance upon the reasons for changing their policies as to trucking stated by respondents in the answers which they made to the Burns-Clark questionnaire prior to the beginning of the present proceeding.[7] We believe that it is a fair résumé of the answers to say that dealer opposition to trucking was given as a reason in only 13 answers,

[6] The Institute's brief, which does not quote these findings, says generally of Findings 11 (a)–(b):

"They represent fragments and bits of evidence removed from their context and considered apart from other uncontradicted evidence and the suggested inference of 'agreements' arises from rank hearsay which is expressly controverted by the competent evidence" (Br. 161).

[7] The Institute had employed Professors Clark and Burns to study, and make a report on, the cement industry (Fng. 11 (b), R. 16046).

that 24 definitely do not give this reason, and that six are ambiguous in this respect.[8] The Commission may well have attached more weight to these answers than to the self-serving testimony of respondents' officials given in the instant proceeding. On the whole record, we think that the Commission was well advised, rather than subject to criticism, in not finding that the "devastating effect" on dealer relations was either "the reason" or the "primary reason" for respondents' discontinuance or limitation of trucking.

The findings quote from the answers of six respondents, including four of the five largest producers of cement (Fng. 11 (b), R. 16046–7).[9] We deny that the quotations given are either unrepresentative or out of context. The Commission might have quoted twice as many answers at least indicating equally clearly that maintenance of or control over delivered price was a primary reason for the action taken to eliminate or limit trucking. Thus the answer filed for all of its mills by Penn-Dixie, the other of the Big Five, states:

> (2) Since it was impossible to accurately figure the cost of delivery by truck the

[8] Inst. App. III, 1630–67. When a producer had more than one mill, sometimes a separate answer was filed for each mill and sometimes one answer was filed for all. Our count of the answers treats the latter situation as one answer.

[9] The big five of the industry are Alpha, Lehigh, Lone Star, Penn-Dixie, and Universal (Fng. 4 (a), R. 15981).

manufacturer had no control of the delivered price at destination which is necessary to prevent the disruption of marketing practices at destination (Inst. App. III, 1638).

North American answered in part:

Because method of calculating price based on delivered price at point of consumption could not be followed when point of consumption was not definitely known (*id.* 1647).

Signal Mountain answered:

Because of uncertainty of prices at destination when delivery was made to buyer's trucks at mill, whereas carload prices at destination were determinable (*id.* 1658).

Nebraska answered:

Lack of standard trucking prices demoralized the market.

Truckers returning from large markets like Omaha, would haul cement for gas and oil on return trips. Delivered prices became demoralized (*id.* 1664).

Consolidated answered:

On March 31, 1933 we discontinued policy of selling cement on trucks at our mill because of uncertainty of price at destination when delivery was made to buyer's trucks at mill, whereas carload prices at destination were determinable. (*id.* 1666).

In the light of all the foregoing, what remains of the Institute's assertion that the Commission has seized upon words and phrases out of context and has "distorted the evidence"? In the same light, is or is it not a distortion of the evidence to assert that "every" respondent which took steps to control trucking stresses as "the reason" the devastating effect on its dealer relations? And while the Institute's brief prompts such queries, it must be stressed that the only legal issue respecting the Commission's finding is whether there is evidence of substance to support it.

The findings also did not omit, as the Institute has asserted (*supra*, p. 10), any reference to dealer opposition to trucking. The Commission found that "organized dealers" opposed trucking for the reason, among others, of "keener competition" among them which resulted from trucking (Fng. 11 (e), R. 16049). Trucking tended to defeat uniformity in delivered prices, which most of the larger dealers are probably as much interested in maintaining as are respondents. The president of the association of dealers who organized the July 1931 conference mentioned later (*infra*, p. 15) testified that "we were trying to stabilize the market so that we would know, as dealers, where we stood, where we were and how we could quote" (R. 2031).

Many dealers must have found trucking an advantage; otherwise, they would not have undertaken it or undertaken it on a scale which made it a serious problem. Huron's brief in this Court (pp. 5, 8, 21) sets forth advantages of truck over rail delivery and the extent to which delivery by truck may supersede delivery by rail when a business is conducted with a view to realizing the full potentialities of the former method of delivery. Normally it would be the small dealer whose business was not of such volume as to warrant carload deliveries to whom trucking would be most advantageous.[10] The very reason for the opposition of large dealers may well have been that trucking served to offset disadvantages under which the small dealer labored when delivery was by rail.[11]

There is also ample support in the evidence for the Commission's finding, attacked by the Institute (Br. 169–178), that the respondents "through cooperation, understandings, and agreements among themselves and with other interested groups" took active steps to "eliminate, discourage, and control

[10] Respondent Diamond made the following statement to Professor Burns on June 20, 1935: "The elimination of trucking immediately eliminated many small customers which may or may not have materially affected total volume, but it did antagonize many customers who had come to enjoy the advantage of both service and cost" (Comm. Ex. 971–13K).

[11] Kosmos' answer to the Burns-Clark questionnaire said: "On account of objections from our carload dealers located within the trucking area" (Inst. App. III, 1657).

the trucking of cement." We call attention in this connection to some of the documentary evidence referred to in the findings.

Penn-Dixie's sales manager wrote to the president of that company in July 1929 (Fng. 11 (c), R. 16047):

> A plan is being developed to improve the trucking situation, particularly in the Lehigh Valley.
>
> I understand this morning that *the plan as now contemplated* puts in a minimum price f. o. b. destinations of $2.44 cloth, and a price f. o. b. trucks at *all mills* in the Lehigh Valley and New Jersey districts of $2.40 cloth.[12] [Italics supplied.]

The president of an association of cement dealers, the president of the Institute, and representatives of various railroads held a meeting in July 1931 for the purpose of discussing means of eliminating or controlling trucking and decided that the railroad representatives would carry out this objective by conferring with officials of the cement manufacturers on their respective lines (Fng. 11 (e), R. 16049). Vice presidents of the railroads

[12] By October of that year the Lehigh Valley and New Jersey mills did have in effect a 15¢ per barrel differential against delivery to trucks at the mill (Fng. 11 (c), R. 16047). The Institute states (Br. 171) that two respondents did not adopt such charge, but it appears merely that there is "no evidence" as to them (Inst. App. III, 1186).

involved did so confer and their reports of these interviews disclose the following:

Hercules stated that, with the establishment of certain short haul rail rates "and also due to understanding with the other cement companies," it had abandoned trucking (Fng. 11 (e), R. 16050). Green Bag of Pennsylvania stated that it would make no commitment to discontinue trucking, but indicated that "if this is done it will be the result of an understanding within the cement industry" rather than through intervention by an association of dealers or the railroads (*id.*, 16050–1). Penn-Dixie stated that the best way to control the situation was to make "an arbitrary charge on all cement loaded on trucks at the mill" (*id.*, 16052). The report of this interview then continues: "As you are aware, there has been an agreement among the cement companies to make a charge of 15¢ a barrel in this connection, but I am told that all the companies have not strictly adhered to the agreement" (*ibid.*).[13] Medusa stated that it will be glad to discontinue trucking "if the other cement companies will agree to do likewise" (*ibid.*).

[13] The "cross-examination" of the writer of this report by Institute counsel, set forth in its brief (175–177), comes down to this—he had no personal knowledge of an "agreement," no agreement with him was entered into, the word "agreement" which he used undoubtedly was—well, an exaggeration."

The parties to the July 1931 conference again met in January 1932 (Fng. 11 (f), R. 16053). The minutes of this meeting state (*id.*, 16054):

> Cement producers in the entire State of Ohio, with the exception of the northern part of the State, *have reached an agreement* as far as concerns stabilization of prices, *the result of which means that the movement of Cement by truck will be discontinued.*
>
> The producers in the northern part of the State, which will include Castalia and Toledo, O., *have not as yet reached an agreement but it is hoped that they will do so shortly.* [Italics supplied.]

The extent to which respondents actually barred or curbed trucking, as set forth in Finding 11 (h),[14] R. 16054–5, bears upon the significance of the foregoing documents and others, as well as the entire body of evidence relating to trucking.

The Institute avows (Br. 179–80) that the evidence establishes no connection between it and activities directed against trucking. However, the reason why McFarland was the sole producer invited to the important July 1931 conference previously mentioned was that he was the president of the Institute (R. 3879, 3887–8). The man who organized the conference testified

[14] The Institute has not attacked this finding. The facts there stated are summarized in our original brief (76).

that he felt that McFarland "represented all of the manufacturers as president of the Cement Institute" (R. 3879). He also testified to numerous communications between himself and McFarland relating to closing of plants to the trucking of cement (R. 3869).

The "Compendium of Established Terms and Marketing Methods" adopted by the Institute after the end of NRA declares it to be an unfair method of competition knowingly to ship cement by any transportation agency which makes rebates or other concessions having the purpose or effect of influencing sale or purchase of cement (Fng. 11 (g), R. 16054). This provision applied to any transportation agency which did not have its tariff rates "responsibly on file" with the Interstate Commerce Commission or a state commission, and it applied to shipment by truck or water if the equivalent of a rebate was given (R. 1505).

(3) *The Institute's attack upon finding 8 (d) relating to the Institute's freight rate books*

The Institute, after quoting a part of Finding 8 (d) (R. 16008), states (Br. 61) that this is the "only finding" as to respondents' use of the Institute rate books. The Institute says (Br. 61–2): "The finding suggests that all of these 76 respondents used" these rate books whereas "the

record" shows this not to be true. The brief (61) comments in this connection:

> Here is a splendid example of what Congress had in mind when it provided in the new Administrative Procedure Act that a reviewing court shall set aside a finding "unsupported by substantial evidence" and that "in making the foregoing determinations the court shall review the whole record."

But Finding 8 (d) is *not* the only finding as to respondents' use of freight-rate books. The Commission found: "The Institute rate books have regularly been used for pricing purposes, either directly or indirectly, *by most of the corporate respondents located in territory covered by the rate books* * * *" (Fng. 8 (g), R. 16012).[15] Earlier the Commission had defined the territory which the books cover: "The Institute has published rate books for substantially every State east of the Rocky Mountains" (Fng. 8 (c), R. 16008).[16]

Thus, the findings themselves show that the Institute has not been very happy in its choice of a "splendid example" of the need for judicial review of "the whole record" in order that find-

[15] Italics supplied.

[16] The Government's original brief (70) refers to and accurately states the substance of the above-quoted provisions of Findings 8 (c) and 8 (g).

ings of administrative bodies "unsupported by substantial evidence" shall be set aside.

(4) *The Institute's attempt to show diversity in the basis on which respondents determined delivered prices*

The Institute states (Br. 90) that pricing other than pursuant to the multiple basing-point delivered-price system described and found by the Commission are used in important markets and areas. The Institute comments: "Even more important than the diversity of methods shown, is the basic fact that this diversity reveals." The impression sought to be conveyed, here and elsewhere in the Institute brief (see also 104, 148), is that there were important and substantial variations in the manner in which respondents computed their delivered prices. We submit that, in fact, the variations were minor and without significance to the issues in this case.

We leave to one side, as does the Institute, the pricing practices of the Pacific Coast producers, other than to observe that zone delivered prices, as found to exist in southern California (Fng. 7 (m), R. 16000), achieve uniformity in delivered price as effectively as the formula of lowest combination of base price plus freight to destination. In the remainder of the country, the so-called variations from the accepted pricing formula are these:

First and foremost are the arbitrary prices, or price zones, established in territory in which im-

ported cement is offered at prices lower than those resulting from application of respondents' pricing formula (Fng. 19 (a), R. 16102). If this is "diversity" in pricing methods, it amounts to this—that in areas where conditions beyond respondents' control make it impossible for them to sell under their multiple basing-point system of pricing, they do not there sell under this system.

The Institute also refers to the existence of zone delivered prices in certain areas. The chart to which it invites attention (Inst. App. I, Chart II–I, 562) discloses that during the ten-year period which it covers, zonal prices were occasionally in effect for very limited periods of time in certain scattered counties or areas.[17] The only zone delivered price of any consequence is that which Huron maintained for about six months in the lower Michigan Peninsula; in other words, to this extent and for such time, one of the 74 respondent producers elected to sell at delivered prices computed otherwise than on the basis of the lowest combination of base price plus freight to destination.

The Institute also refers to what it describes as "flat delivered prices" in mill switching areas and

[17] The zonal prices shown are as follows: State of Ohio, less than 4 months in 1931; one county in Pennsylvania, less than 4 months; one county in Wisconsin, about 5 months; the lower peninsula of Michigan, about 6 months; two counties in Ohio and 3 in Kentucky, duration not shown.

areas served by groups of mills. This is a minor variation of the basing-point pricing system designed to facilitate uniformity in delivered price. We quote below from a letter from an officer of Penn-Dixie to Professor Burns, one of the economists employed by the Institute, as to the pricing practice of the Lehigh Valley group of mills.[18]

In the case of "flat" or "zone" prices in important metropolitan areas, the usual system for determining delivered price is followed, with the slight variation that all points in such metropolitan area are treated as one destination, thereby facilitating bringing about uniformity in the delivered prices of the respondents selling in such area.

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[18] "The Lehigh Valley District Group consisting of 27 mills covers an area approximately 40 miles in length and 10 miles in width. For distances of 50 miles or less the rate from each mill in this group is figured on its own individual mileage, and these rates vary in amounts * * *. For all destinations located over 50 miles from the various mills the rates are grouped and the same identical rate applies from all mills in the group. These group rates are arrived at by using the distance from Northampton, Pa., which is approximately the center of the group. A minimum freight rate of 19¢ per barrel is observed in making delivered prices in this district." (Inst. App. I, 573–4.)

The same letter also covers five other groups of mills (*id.*, 574–5).

II. THE GOVERNMENT HAS NOT ABANDONED ITS ATTACK UPON THE RULING BELOW THAT EVIDENCE RELATING TO EVENTS OCCURRING PRIOR TO ORGANIZATION OF THE INSTITUTE IS INCOMPETENT.

The Government's brief (29) specified the above ruling as an error to be urged, but did not separately discuss this specification and the Institute infers (Br. 28) that it has been abandoned. The argument presented in our original brief (81–82, 84–85) in support of the competency of the evidence relating to the NRA period set forth facts and principles which, as we believed, established the relevancy and competency of what the Institute refers to as the "ancient" or "old" evidence. In view of the Institute's position, however, we now deal directly with this question.

Respondents' answers to the Commission's complaint averred that their multiple basing-point delivered-price system must be judged "as a marketing method going back to the early days of this industry," and that to determine whether it is an unfair method of competition, "the background of its inception and development" must be considered (R. 266–7, 274). Evidence to refute such defense, showing the extent to which understandings and agreements among members of the industry had contributed to the adoption and spread of respondents' pricing system (see

Fngs. 7 (i)–(l), R. 15992–9), was obviously material, relevant, and competent.

Even apart from the issues raised by respondents' defense, the evidence under consideration is competent and admissible. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 46–47; *United States* v. *Reading Co.,* 253 U. S. 26, 43–44. See *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 361. *American Tobacco Co.* v. *United States,* 147 F. 2d 93, 119 (C. C. A. 6), affirmed on other grounds, 328 U. S. 781, held that in a criminal case under the Sherman Act "historical testimony" showing the relation of the defendants to the old American Tobacco Company, which this Court had ordered dissolved (221 U. S. 106), was admissible "for the purpose of throwing light upon the subsequent offenses, acts, and practices charged" against the defendants.

For like reasons, it was appropriate for the Commission to receive and consider evidence relating to the growth and purposes of various practices employed by respondents to assure successful operation of their pricing system and identity in their delivered prices. See Fngs. 14 (b)–(c), 17 (b); R. 16065–9, 16090–1.

The Institute has also suggested (Br. 30) that there is estoppel by judgment as to evidence introduced, or available to the Government, in

Cement Manufacturers Assn. v. *United States*, 268 U. S. 588. That case and the present one involve different parties, different periods of time, and different issues,[19] and there is no such estoppel. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 152–153; *Aluminum Co. of America* v. *United States*, 302 U. S. 230, 232–233.

III. THE COMMISSION DID NOT CONTEND IN THE COURT BELOW, NOR DOES IT NOW CONTEND, THAT RESPONDENTS' MULTIPLE BASING-POINT DELIVERED-PRICE SYSTEM IS ILLEGAL PER SE

Universal Atlas (No. 31) asserts (Br. 11–12, 24) that the Commission's "basic contention" in the court below was that respondents' pricing system is illegal *per se*. The Institute also asserts (Br. 83, 142) that the Commission so contended. The basis for this assertion is a statement by the court below which does not support the assertion made by these respondents[20] and the following heading in the Commission's brief in the court below (45):[21]

> The multiple basing point system concurrently used by the respective corporate

[19] See our original brief (40).

[20] The court below, in discussing the scope of the prohibitions of the Clayton Act, as amended by the Robinson-Patman Act, said that "this court is now urged to hold that the system is illegal per se, and to require that cement be sold on an f. o. b. plant basis" (R. 16815).

[21] The Institute (Br. 88, note 1) also refers to page 29 of the Commission's brief below, but we deny that any *per se* doctrine was there stated.

> petitioners is a device for automatically frustrating price competition and is inherently collusive, oppressive, and unfair.

The first sentence under this heading defines its meaning and removes any possibility of the interpretation adopted by the Institute and Universal Atlas. The sentence reads:

> In taking the above stated position we build on well established judicial principles that conspiracies are seldom capable of proof by direct evidence (such as we claim exists here) but may be inferred from a common course of action in pursuit of a disclosed common objective, that identity of prices among organized competitors is itself some evidence of collusion, and under certain circumstances becomes compelling evidence.

We have not contended in this Court, as the Institute has asserted (Br. 83–84, 142), that respondents' pricing system is illegal *per se*. Our brief set forth (42–49) that under this system there is no price competition among respondents. We urged that the absence of price competition is pertinent to the question whether the pricing system is maintained collusively and by combination, not that the fact of noncompetition made the system illegal *per se*. We expressed the view (Br. 40–41) that the Federal Trade Commission is empowered to determine that a trade practice which necessarily operates to suppress competi-

tion constitutes an unfair method of competition even though the practice is not the product of agreement, but this is not a contention that the practice is illegal *per se*.

IV. IF THE COURT BELOW HELD, WHICH WE DENY, THAT THE COMMISSION FAILED TO FIND COMBINATION AMONG RESPONDENTS, THAT QUESTION IS BEFORE THIS COURT UNDER THE PETITION FOR CERTIORARI

Universal Atlas has stated (Br. 13, 14, 19–20), without citation to the record, that the court below held that the Commission made no finding of combination among respondents to restrain commerce by use of the multiple basing-point delivered-price system, and Universal Atlas contends in this connection that the petition for certiorari did not present this as a question to be reviewed.

First, we believe that the court below did not so hold. There is a long discussion in the opinion of certain findings of the Commission under the heading "Has the Commission Found the Combination Alleged in its Complaint" (R. 16770–85), near the end of which the court observed that there is "merit" to respondents' "criticism" of finding 26 as constituting a finding of combination, and said that there was no "forthright finding as to the combination charged" (R. 16783). The court criticized finding 26 upon the ground that it was "predicated upon" the previous findings,

some of which, the court said, were based on "testimony which we hold to be incompetent" (R. 16783-4). But the court, in then discussing the Commission's reliance upon certain other findings, said that they cannot form the basis for "the combination found in finding 26" (R. 16784). The real ground of decision in this aspect of the case seems to be that the Commission had improperly applied the law of conspiracy. The court said that when the Commission predicated its "finding of combination" upon what might be termed "overt acts" in the law of conspiracy, it "placed the cart before the horse" (R. 16785).

Second, the question of whether the Commission made adequate findings of combination is before this Court on respondents' defense of the judgment entered by the court below, so that controversy over whether the petition for certiorari presented the adequacy of the findings as a question for review by this Court seems to be shadow-boxing. *Cf. Walling* v. *General Industries Co.*, 330 U. S. 545, 547. No respondent other than Universal Atlas has raised this issue.

Third, the Government in its petition for writ of certiorari, out of an abundance of caution, included in its "Specifications of Errors to be Urged" that the court below erred in holding "that the Commission did not find that respondents had been parties to a combination to restrict competition * * *" (Pet. 14). The petition

elsewhere disclosed that the question whether the Commission had adequately found combination was likely to be one of the contested issues on review. The petition, in summarizing the opinion below, stated (Pet. 13) that the grounds of decision were not clear, but that one of the principal grounds appeared to be that the Commission had not found combination among respondents with sufficient definiteness. We are not aware of any authority which holds that, in determining what questions the petition presents, the Court must confine its consideration to the portion of the petition formally labeled "Questions Presented."[22]

Fourth, the first question presented by the petition (Pet. 2) was whether "the evidence supports the findings of the Federal Trade Commission that respondents * * * had conspired to restrict competition by various means and methods, and particularly by the maintenance of a multiple basing-point delivered-price system * * *." This subsumes the question of a finding of com-

[22] *Connecticut Ry. & Lighting Co.* v. *Palmer*, 305 U. S. 493, 496, held merely that the Court would not consider questions not presented by the petition. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, held that this Court would not go beyond the petition and examine the accompanying brief in determining what questions were presented. In *General Talking Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175, 177–179, the Court declined to consider two questions which had not been referred to in the petition and which, as far as the Court's opinion shows, were referred to in the brief supporting the petition only to the extent that they were included in the specifications of errors there set forth.

bination. Questions "urged in the petition for certiorari and incidental to their determination will be considered on review." *Rorick* v. *Devon Syndicate,* 307 U. S. 299, 303.

V. MARQUETTE'S ATTACK UPON THE JURISDICTION OF THE COMMISSION OVER THIS PROCEEDING AND ITS CONTENTION THAT THE COMMISSION SHOULD BE RECUSED BECAUSE OF "BIAS" ARE WITHOUT MERIT

(1) *The Commission's alleged lack of jurisdiction*

Marquette's argument proceeds syllogistically, that the Department of Justice is alone empowered to enforce the Sherman Act, that the present proceeding is one to enforce the Sherman Act, and that the Commission was therefore without jurisdiction to institute this proceeding.

The difficulty with this syllogism is that the premise that in this proceeding the Commission is enforcing the Sherman Act is false. The only possible basis for such premise is the assumption that competitive conduct which restrains trade and is violative of the Sherman Act is thereby extruded from the operation of the Federal Trade Commission Act. To the contrary, it is obvious, as decisions of this Court have repeatedly demonstrated, that modes of competition, though they restrain trade and violate the antitrust laws, may nevertheless constitute unfair methods of competition which the Federal Trade Commission is

empowered to suppress. Cf. *Nat. Broadcasting Co. v. United States*, 319 U. S. 190, 222–224. Indeed, it would be a novel and striking doctrine were it to be held that a respondent in a proceeding under the Federal Trade Commission Act could escape its prohibitions upon the ground that the charges against it, however true and however clearly within the general scope of that Act, were also a violation of the Sherman Act.[23] Should Marquette thus succeed in establishing a dichotomy between the enforcement functions of the Commission under the Trade Commission Act and those of the Attorney General under the Sherman Act, the nature of the defense which will be offered in many proceedings under these statutes can be predicted with certainty.

The holding in *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52, is in direct conflict with Marquette's contention. This Court there upheld the Commission's determination that respondent wholesalers had combined to restrain competition and fix prices for their product in interstate commerce in violation of the Federal Trade Commission Act. Paragraphs (b) and (c) of the order, which this

[23] It is elementary that the same conduct or transaction may be a violation of two statutes and may be prosecuted under both even when both are criminal. *Gavieres v. United States*, 220 U. S. 338; *Blockburger v. United States*, 284 U. S. 299.

Court reviewed and sustained, were directed at conduct which plainly violated the Sherman Act.[24] In *Fashion Originators' Guild, Inc. v. Federal Trade Commission*, 312 U. S. 457, this Court specifically remarked on the fact that the Commission's findings brought the combination against which its order was directed "well within the inhibition of the policies declared by the Sherman Act itself" (p. 465).

This Court has frequently recognized that the Federal Trade Commission Act was intended to implement the policy declared in the Sherman Act, and necessarily parallels and overlaps it in points. See, e. g., *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 463; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 453–455. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (C. C. A. 7), certiorari denied, 323 U. S. 730, sustained an order of the Commission against a price-fixing combination and the identical argument now made by Marquette was urged by petitioners as a ground for grant of certiorari. The lower federal courts have consistently upheld orders against price-

[24] As stated by this Court (p. 61), paragraph (b) prohibited respondents "separately, or in combination, from using any price list fixed by agreement" in making interstate sales and paragraph (c) prohibited "making or acting under agreements fixing prices on mill shipments when the paper sold is shipped from outside the State where the wholesaler is located."

fixing combinations entered in proceedings under the Federal Trade Commission Act.[25]

United States Alkali Assn. v. *United States*, 325 U. S. 196, does not support Marquette's position. That case held that the United States was free to proceed against an export association whose alleged conduct in restraint of trade carried beyond the qualified exemption from the Sherman Act accorded it under the Webb-Pomerene Act, though the Commission had not exercised the power conferred upon it by the latter Act to investigate unlawful activities of export associations and to recommend action to the Attorney General. The Court held, contrary to the argument here pressed by Marquette, that the grant to one agency of Government of jurisdiction to proceed under one statute was not an implied limitation of the jurisdiction to institute proceedings which a different statute conferred upon another branch of the Government.

(2) *The alleged "bias" of the Commission*

Marquette contends that the Commission, because of bias and prejudgment, was not qualified

[25] *J. W. Kobi Co.* v. *Federal Trade Commission*, 23 F. 2d 41 (C. C. A. 2); *California Rice Industry* v. *Federal Trade Commission*, 102 F. 2d 716, 720–722 (C. C. A. 9); *U. S. Maltsters Ass'n.* v. *Federal Trade Commission*, 152 F. 2d 161 (C. C. A. 7); *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 479 (C. C. A. 7); *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899 (C. C. A. 7), certiorari denied, 329 U. S. 795.

as an impartial tribunal to hear the contested issues. This charge against the Commission is principally based upon statements respecting the cement industry contained in reports of the Commission pursuant to Section 6 of the Federal Trade Commission Act, 15 U. S. C. 46.

We are not aware of any legal basis upon which the Commission could be required to recuse itself from this proceeding. The Act creating the Commission made no provision for its disqualification and, if it sought to do so, a vacuum of authority would be created. In *United States v. Morgan*, 313 U. S. 409, where disqualification of the Secretary of Agriculture was sought on similar grounds, this Court point out (p. 421) that none other than he had legal authority in the premises and that he could not, consistently with his duty, "create a situation in which no order could be made." We also deny that the material upon which Marquette relies can properly be construed as showing "disqualifying convictions" by the Commission such as would, to use the words of the Court in the *Morgan* case, render the Commission incapable of "judging a particular controversy fairly on the basis of its own circumstances."

Marquette first asserted that the Commission had prejudged the case more than a year after the taking of testimony had been concluded and did not formally charge bias until May 1942,

some five years after the proceeding started. *Marquette Cement Mfg. Co.* v. *Federal Trade Commission,* 147 F. 2d 589, 591 (C. C. A. 7). The court below rejected Marquette's motion to recuse on the merits, but it also held that "the attempt to disqualify was made too late" (*id.* 592). It would also seem that since Marquette did not apply for certiorari to review this decision, it is "too late" in now seeking review by this Court.

VI. THE INSTITUTE FAILS TO SHOW THAT THE PROHIBITIONS OF THE COMMISSION'S ORDER REQUIRE MODIFICATION

The Institute contends (Br. 246–257) that, even though this Court should sustain the Commission's findings, its order is nevertheless defective in certain respects and requires correction. Some of the arguments directed against the order are merely a restatement of respondents' position as to the substantive law of the case and these will not be here answered.[26] Complaints against the order itself are made on the basis of its

[26] Thus the arguments against paragraphs 2 (j) and 2 (n) of the order which deal, respectively, with dissemination of freight-rate data and statistical data, are a renewal of earlier arguments that respondents' activities in this respect are legal under the old *Cement* case. The argument against paragraph 3 of the order, which deals with prohibited price discriminations under the Clayton Act, is hardly more than a further argument that freight absorption is *per se* legal under section 2 (b) of that Act.

alleged redundancy or indefiniteness, without any regard for the established principle that the courts will modify an administrative order only if the order transcends "allowable judgment" in the matter or reflects an error of law. *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, 611–613; *Virginia Electric & Power Co.* v. *Labor Board,* 319 U. S. 533, 543–544.

Respondents' main attack is against the preamble of the order, which prohibits "a planned common course of action," understanding, agreement, combination or conspiracy between respondents "and others not parties hereto" to do specified things, the words quoted being those which Institute wishes to have excised. The first-quoted phrase, apparently objected to solely as redundant, was selected by the Commission as being probably more meaningful to businessmen than words denoting legal concepts such as "agreement," "conspiracy," and "combination." Its use in previous orders was specifically approved in *Salt Producers Association* v. *Federal Trade Commission,* 134 F. 2d 354, 356–357 (C. C. A. 7), and *American Chain and Cable Co.* v. *Federal Trade Commission,* 139 F. 2d 6[illegible]2 (C. C. A. 4).

The second-quoted phrase, which in substance prohibits the respondents from conspiring with others to effect the forbidden ends, is surely within the ambit of the Commission's powers to

remedy the violations of law which it has found. The record disclosed that the respondents have entered into agreements and understandings with such diverse groups as rail carriers and organized cement dealers when respondents' purpose to maintain their noncompetitive system of pricing conferred incidental benefits on such groups. The order is operative only as to the respondents and does not have any potential to subject to contempt proceedings third parties with whom the respondents may enter into forbidden understandings.

The remaining criticisms which respondents direct against the order are primarily devoted to establishing that certain prohibitions are duplicated by others. While harmless surplusage is certainly not a sufficient reason for modification, we point out that in no instance does complete duplication exist. Paragraph 2 (c) forbids[37] f. o. b. mill prices derived by calculation from a basing-point price established at some point other than the actual shipping point. It does not overlap, and is not overlapped by, Paragraph 2 (d) which forbids quotation of ostensible f. o. b. mill prices which, in conjunction with transportation charges to the purchaser's destination, are systematically equivalent to identical delivered

[37] This and succeeding paragraphs mentioned are, of course, modified by the preamble and what we here state is forbidden is actually forbidden insofar as it is the product of combination.

costs to such purchasers from differently located mills.

Paragraphs 2 (f) and 2 (g) are both necessary in that they deal primarily with two different means whereby phantom freight is realized: (1) that resulting where the rail rate factor included in the delivered price is greater than the rail rate actually incurred, and (2) that resulting from the use of a transportation carrier (e. g. water) having a rate cheaper than the rail rate factor included in the computation of delivered price.

VII. THE COMMISSION DID NOT ERRONEOUSLY EXCLUDE EVIDENCE OFFERED BY RESPONDENTS

The Institute (Br. 238–241) presses its motion, denied below (R. 16816), for leave to adduce additional evidence. The Institute charges (Br. 238–9) that the trial examiner, in the reception of evidence, was lenient as to the Commission and strict as to respondents. To support this charge, the Institute quotes, without any explanation of the specific matter involved, three remarks of the examiner. We believe that the remarks, even when so judged, are proper and self-explanatory. His remarks respecting respondents' proffers came only after they had been permitted, under an extremely liberal application of the principle of relevancy, to introduce testimony filling thousands of pages of the transcript. Our answer

to the implied charge of unfairness is that the evidence of respondents which was excluded was either irrelevant to the issues or unnecessarily cumulative of evidence already in the record.

The propriety of excluding evidence on the five subjects as to which the Institute now complains is shown by the Commission's answer to the motion made by the present respondents for leave to adduce additional evidence (R. 16665–86). In this connection, we call the following to the Court's attention:

(1) We unqualifiedly deny that the record discloses a single exclusion of any genuine f. o. b. bid made to a governmental agency prior to issuance of the complaint. The supposed f. o. b. mill bids, evidence as to which was excluded, were bids derived from a delivered price figure determined under the basing point system (R. 16667–8, 16695). We have discussed (*supra*, pp. 4–7) what the record shows as to respondents' departure from formula pricing in bids to governmental agencies. No evidence as to bids of this category was rejected.

(2) As to evidence of dealer opposition to trucking, the Commission's counsel conceded (R. 10735) that some dealers opposed trucking, a concession which rendered respondents' proferred evidence cumulative. For further grounds for the ruling, see R. 16670–1.

(3) Respondents did not deny that all-rail rates are usually higher than all-water rates (R. 16672)

but offered evidence, minor in scope, that at times a combined rail-water rate was higher than the all-rail rate.[28] This evidence was not material to the issue whether respondents had taken concerted action to deny to purchasers the benefit of cheaper forms of transportation.

(4) Two exhibits offered to show that the cement of two respondents was principally sold at places comparatively close to their mills were excluded because not prepared by the witnesses offering the exhibits, but they were permitted to testify as to facts within their own knowledge as to shipping distances from their mills (R. 16675).

(5) Evidence as to the "fairness of cement prices" offered by respondents was clearly irrelevant to the issue whether they had combined to eliminate price competition. Tampering with prices, through combination, is illegal *per se* and, on this issue, evidence as to the "reasonableness" of prices is properly rejected. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. Respondents nevertheless urge that surveys made at their instance purporting to show their profits were relevant to rebut certain findings of the Commission.[29]

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[28] Respondents described the evidence as (1) an exhibit consisting of tabulations of rail and water rates from Alsen, N. Y., to destinations on Long Island, and (2) testimony as to water deliveries from New York Harbor (R. 16580).

[29] Among these were findings that the respondents' combination tended to "maintain artificial and monopolistic meth-

Receipt of the evidence offered to prove that over-all industry profits were not excessive, or were even low, would have led to an extended and fruitless inquiry into the profits of 50 producers and the reasonableness of their profits, but would not have rebutted the findings to which reference is made. A showing of a low profit level in the cement industry has only remote relevancy to the question of rigidity in cement prices, base prices at a level sufficiently high to permit sales by the various producers outside their natural tributary areas, and maintenance of "artificial and monopolistic methods and prices." The wastes entailed in the pricing system used by respondents might well produce both high prices and comparatively low over-all profits.

There is solid basis for this view. In its report to the Congress in March 1932 entitled *Price Bases Inquiry—The Basing-Point Formula and Cement Prices,* the Commission said (pp. XX–XXI):

> An approximate measure of the uneconomic production and distribution cost imposed by a system of selling not fully competitive is found in a mill's freight

ods and prices" (Fng. 26, R. 16131); that it tends to maintain "a price level sufficiently high to permit * * * respondents to sell cement" outside their natural tributary area (Fng. 23 (c), R. 16126) and that cement prices have been relatively rigid even during periods of depression (Fng. 23 (e); R. 16126–7).

absorptions, i. e., the excess of its average price at the mill for a given period over its weighted average mill realization, or net price, on all shipments for that period. On cement sales of 141,000,000 barrels for 1927, representing 81 percent of the total shipments for that year, this excess amounted to an average of 24.3 cents per barrel, or a total of $34,000,000. Applying this per barrel rate to the entire shipments for 1927, the total would amount to about $42,000,000. Of the total production and selling cost, these freight absorptions are estimated to amount to an average of about 20 percent, widely deviating from this average, however, as regards individual mills or regions. This estimate represents the maximum amount that could be saved by eliminating cross freighting.

* * * * *

The habitual practice of the crosshauling of a standardized commodity like cement appears to be due primarily to a rather rigid maintenance of mill prices at a relatively high level and only secondarily to "tonnage hunger," as often alleged. The high level of mill prices makes the crosshaul possible without absolute loss in total sales, and the rigidity of prices tends to prevent the expansion of sales in maximum net territory by mill price reduction. Under

such conditions the mill seeks to satisfy hunger for large volume, intensified often by surplus capacity, by pushing out into less profitable territory in an effort to capture another mill's most profitable business. The result is a swapping of more for less profitable customers at a large net loss to the public in wasteful production and distribution costs.

The basing-point formula of selling assists in maintaining this rigidity of price at the mill in that it prevents a mill in one market area from dumping its product into another market area at prices below the formula delivered prices of the latter without first reducing its own mill price.[30]

CONCLUSION

It is again respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, with directions to affirm the order

[30] For full development of the foregoing facts and conclusions, see pages 134–146 of the same report.

"Heavy costs have been incurred in the cross-shipment of cement. * * * Profits, however, have been moderate, perhaps because the gains resulting from the system have been canceled by the costs which it entails. But eight of the leading producers made 5.94 percent on their invested capital in 1937, 4.07 percent in 1938 when half of the industry's plant was standing in idleness, and 7.4 percent in 1939." Wilcox, *Competition and Monopoly in American Industry*, T. N. E. C. Monograph No. 21, p. 156.

of the Federal Trade Commission as to all of the respondents.

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